No. 83-392

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1982

PRIMITIVO FLORES RUIZ, PETITIONER

v.

HOYT C. CUPP, SUPERINTENDENT,
OREGON STATE PENITENTIARY, RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Cecil H. Quesseth
Member of the Bar,
United States Supreme Court
270 Cottage Street N.E.
Salem, Oregon 97301
(503) 588-2666
Counsel of Record

Michael E. Swaim
270 Cottage Street N.E.
Salem, Oregon 97301
(503) 363-0059

Attorneys for Petitioner

Frederick L. Bennet
District Attorney
Umatilla County Courthouse
Pendleton, Oregon 97801
(503) 276-7111

Scott McAlister
Assistant Attorney General
100 State Office Building
Salem, Oregon 97310
(503) 373-7044

Attorneys for Respondent

QUESTIONS PRESENTED

1. Whether the trial court's refusal to allow defense counsel to resign after being informed by defense counsel that he has a serious conflict with his client which "effectively prevent(ed) (counsel) from representing (petitioner) to the fullest of (counsel's) ability" deprives defendant of his Sixth Amendment right to the adequate assistance of counsel.

2. Whether a conviction for the crime of "Custodial Interference in the First Degree" can stand when the record is totally devoid of evidence on one of the four elements of the charge.

3. Whether advising the jury that petitioner had been previously repremanded by a judge not to contact or communicate with the subject of the purported Custodial Interference deprived petitioner of his right to a fair trial and fundamental due process when such fact was not relevant to any element of the crime charged.

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JURISDICTION

The Judgment of the Court of Appeals for the Ninth Circuit was entered on June 23, 1983. This petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

Sixth Amendment, United States Constitution: "In all criminal prosecutions, the accused shall * * * have the assistance of counsel for his defense."

Fourteenth Amendment, United States Constitution: "* * * nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Oregon Revised Statutes 163.257: "Custodial Interference in the First Degree":

(1) A person commits the crime of Custodial Interference in the First Degree if he violates ORS 163.245 and:

(a) Causes a person taken, enticed, or kept from his lawful custodian to be removed from the state; or be exposed by that person to a substantial risk of illness or physical injury.

(2) Custodial Interference in the First Degree is a Class C Felony.

Oregon Revised Statutes 163.245: "Custodial Interference in the Second Degree":

(1) A person commits the crime of Custodial Interference in the Second Degree if, knowing or having reason to know that he has no legal right to do so, he takes, entices, or keeps a person from his lawful custodian with intent to hold him permanently or for a protracted period.

(2) Custodial Interference in the Second Degree is a Class A Misdemeanor.

Oregon Revised Statutes 163.415: "Sexual Abuse in the Second Degree":

(1) A person commits the crime of Sexual Abuse in the Second Degree if he subjects another person to sexual contact; and

(a) * * * *

(b) The victim is incapable of consent by reason of being under 18 years of age, mentally incapacitated, or physically helpless.

* * * *

(3) Sexual Abuse in the Second Degree is a Class A Misdemeanor.

STATEMENT OF THE CASE

In October of 1979, petitioner was charged with the crime of Custodial Interference in the First Degree (ORS 163.257) in Umatilla County, Oregon. The subject of the alleged interference is a Miss Laurie Kolding, 14 years and 8 months of age at the time of the alleged interference, and described by her father at trial as being "very physically mature for her age."

Petitioner had previously requested permission from Miss Kolding's parents to date Miss Kolding, but her parents refused. In spite of the disapproval of her parents, Miss Kolding and petitioner continued to see each other.

The relationship between petitioner and Miss Kolding continued for a period of time, developing into a serious

romance which eventually resulted in petitioner being charged with commission of Sexual Abuse in the Second Degree a Class A Misdemeanor (ORS 163.415), to which he simply pleaded guilty on July 5, 1979, three months prior to the present charges. As a part of the judgment of conviction for the charge of Sexual Abuse, petitioner was ordered by a Judge Olsen not to "contact or communicate with Miss Kolding by mail, telephone, in person, or in any manner whatsoever, nor cause others to contact her or communicate with her."

Miss Kolding, however, completely disregarded the import of Judge Olsen's restrictions, and thereafter initiated a course of communication with petitioner, which was both intentional as well as intensive, telephoning him twice a day from as far away as Bismark, North Dakota, where she had been sent by her parents. There was no evidence of petitioner ever initiating any communication whatsoever with Miss Kolding after appearing before Judge Olsen.

As a consequence of his problems with the judicial system, petitioner thereafter decided to move to Canada; Miss Kolding decided to follow him. At trial, Miss Kolding testified that she went to Canada of her own

free choice, was not forced in any manner, nor did petitioner entice her to go to Canada. She explicitly testified that the reason she went to Canada was because she felt affection for petitioner and that they simply wanted to be free. Miss Kolding had left her home between midnight and one o'clock in the morning on the date in question, meeting some people a short distance from her home and driving with them to Canada, where petitioner had already taken up residence.

The undisputed evidence is that on the very first day that Miss Kolding met with petitioner in Canada, he have her $200.00 in cash and instructed her that if she wanted to leave then or at any time in the future she would have the money to do so.

Petitioner and Miss Kolding were in Canada for approximately three weeks prior to his arrest. Miss Kolding further testified at trial that she and petitioner were planning to get married and that they were also planning to return to the State of Oregon within a year. However, prior to those happenings, the Canadian Police located the couple and took them into custody on October 19, 1979, and this prosecution ensued.

On Friday, January 18, 1980, four days prior to

the date upon which trial was to commence, the attorney which petitioner had privately retained to represent him spoke with the court regarding his need to resign from the case due to an apparently insoluable conflict. On Monday, January 21, 1980, the day before trial, counsel appeared and formally moved for withdrawal upon the record. At that hearing, defense counsel advised the court as follows:

> "Mr. Wallace (petitioner's counsel): Yes. May it please the court, Your Honor, as the court is aware, I talked with you on Friday regarding this appearance in court today of Mr. Ruiz. There has been a matter come up, my representation of Mr. Ruiz, that has affected the attorney-client relationship.
>
> * * * *
>
> "Mr. Wallace: Also, Your Honor, I'd at this time want to withdraw as his attorney on the basis that there have been several matters which have come up which I am not at liberty to discuss because of attorney-client privilege which effectively prevents me from representing him to the fullest of my ability, and on that basis I would ask the court that I be allowed to withdraw. And Mr. Ruiz also has something he wishes to state to the court in this matter. (emphasis added)
>
> "The Court: All right. Mr. Ruiz.
>
> "Mr. Ruiz: Well, I've decided to dismiss my lawyer on the grounds that him and I, we be (sic) in very, we have been having pretty poor contact in my case and I feel I'd have to have a different attorney to be able to complete, so I think I need some more time.

"The Court: Anything further?

"Mr. Ruiz: Pardon me?

"The Court: Is there anything further?

"Mr. Ruiz: Well, I feel my lawyer and I, we cannot agree to things, you know, and so when we talk over the phone we get into argument instead of get (sic) things straightened out, so I have to have more time to be able to find another lawyer.

"Mr. Bennett (District Attorney): Your Honor, this matter has been pending since the 12th day of October 1979 (the date of arrest in Canada) and the State is prepared to go to trial tomorrow. I would bring to the Court's attention that this would be the second resignation. It appears that Mr. Ruiz is having difficulty being compatible with a number of attorneys. I would object to the motion, and I would request the Court disallow the motion and go ahead with the trial tomorrow. (parenthetical added)

"The Court: Well, there is a very specific court rule which, to my knowledge, has always been, without exception, enforced in this jurisdiction, and the rules of court are that there can be no resignation at a late date such as this, literally on the eve of trial. I believe it provides for seven days prior to the trial before counsel can resign.

"I am not about to compromise that particular rule of court. It will be enforced. This resignation, attempted resignation and dismissal comes far too late. There has been an arrangementfor a judge to come in from another county to hear this matter, there are witnesses subpoenaed and, in any event, I'll not permit the matter of change of attorney. The matter will proceed to trial as scheduled.

> "Mr. Wallace, I guess about the only thing that I can say, that is to be here and be at counsel table and if Mr. Ruiz wants to ask you questions about the procedure or anything of that nature, I guess he can do that, and proceed to defend himself. In any event, this matter will proceed as scheduled on the 22nd. That will be it.
>
> "Mr. Ruiz: Your Honor, don't I have, aren't I entitled to have a lawyer of my choice, one that I can depend upon defending me? That is my constitutional right.
>
> "The Court: Mr Ruiz, you are entitled to be represented by a competent lawyer, period. Whether you like him or dislike him or have arguments with him or whatever, --
>
> "Mr. Ruiz: That means that I am paying money for, just regardless of what one side thinks?
>
> "The Court: Well, anyway, that is the way it will be. All right. Very well. We will stand in recess." (Tr. 26-29).

The case proceeded to trial on Tuesday, January 22nd, with that same privately-retained attorney, just as the court dictated, and petitioner was convicted of two charges of Custodial Interference in the First Degree (Id., 98-99).

REASONS FOR GRANTING THE WRIT

1. The Trial Court's Refusal to Allow Defense Counsel to Resign, In light of Defense Counsel's Uncontradicted Representation to the Court That He Had a Conflict

With His Client Which Effectively Prevented Him From Representing His Client to the Fullest Of His Ability, Was Unreasoned And Arbitrary, Thus Denying Petitioner His Sixth Amendment Right to the Effective Assistance of Counsel.

The record clearly shows that a substantial conflict existed between defense counsel and his client, which conflict was communicated to the Court four days prior to trial. There is absolutely no evidence respecting the subject matter of the disagreement. Petitioner advised the Court that there were arguments between his attorney and himself, and that there was poor contact, but there is little else other than the explicit representation of defense counsel that he was "effectively" unable to represent petitioner to the fullest of his ability.

The District Court below was of the opinion that the problem was one of personalities, perhaps taking its lead from the unsupported statement by the prosecutor that this had been the second resignation in the case. However, that representation was inaccurate, as this attorney had been the only attorney representing petitioner throughout the course of these proceedings; perhaps the inaccuracy was inadvertently represented by the

prosecutor as a consequence of having noted that a different attorney did represent petitioner in the prior case.

The important facts which have been somewhat casually overlooked to this point in time are that the trial court denied the substitution of counsel in the face of an uncontradicted representation by that counsel that he could not defend his client to the best of his ability, and, in addition, there was no showing whatsoever of any prejudice to the prosecution to allowing such substitution of counsel and a reasonable continuance. The better course would have been for the trial court to have inquired as to the substance of the problem, if the court would not accept the representations of the officer of the court making them, and to inquire of the prosecution as to whether there was any reason other than its present preparedness which would recommend not delaying the trial for a reasonable period of time. Instead, the trial court forced unwilling defense counsel to plod ahead with a defense.

Petitioner respectively submits that it is impossible for a reviewing court to look at the cold print and to determine the quality of the defense as unveiled to that jury. Counsel's demeanor and attitude, both of

which cannot be divined from the printed word, necessarily colors every bit of evidence the jurors receive while sitting in judgment upon their fellow citizen.

This Court, in Holloway v. Arkansas, 435 US 475, 98 S. Ct. 1173, 55 L Ed2d 426 (1978), sets forth the test to determine whether or not counsel's request to withdraw ought to be allowed. The facts in this case specifically meet each and every one of those tests: First, there was a potential for conflict -- counsel's client was being held in pre-trial custody, which apparently relegated the attorney-client contact primarily to telephone calls (as noted from the portions of the transcript set forth hereinabove); perhaps most important, defense counsel announced that a conflict in fact existed, and petitioner confirmed it. Second, the attorney was in a better position to know of the existence of the conflict than was the court; the subject matter of the conflict apparently fell into the realm of the attorney-client privilege, which counsel did not voluntarily disclose, nor was he requested to disclose it by the court; it is important to note that this was the attorney that was announcing the existence of the conflict, and not just the client. Third, defense counsel was under an

ethical obligation to report any such conflict, as he did.

In Holloway, this Court noted that the trial courts have recourse for misrepresentations made by counsel and for dilatory acts taken by them. In the present instance, however, there is absolutely no showing that the representations of counsel were either wrong or dilatory. And while the statements and representations of counsel are certainly not binding upon any court, Holloway at least stands for the proposition that such representations should be given serious consideration. After all, noted this Court, attorneys, too, are "officers of the court." In the present instance the unambiguous representations of defense counsel concerning the existence of the conflict and the depth of it were given absolutely no consideration whatsoever.

It seems inappropriate and inequitable for a trial court to force counsel and petitioner to trial in the face of such prima facia evidence of conflict and then to allow the prosecution to argue, after the defense is unsuccesful and while defendant languishes in prison, that it appears that the defendant received adequate representation. Especially in light of such a "thin" case, infra, the evidence which the jury received, other

than testimonial, may well have made the difference between acquittal and conviction.

If the representations of counsel are accepted at face value, as they should be in the absence of any evidence to the contrary, then petitioner has been denied the effective representation of counsel as guaranteed to him by the Sixth and Fourteenth Amendments to the Constitution of the United States, and it is settled law that the denial of the right to counsel can never be harmless. Holloway v. Arkansas, supra; Gideon v. Wainwright, 372 US 335, 83 S. Ct. 792, 9 L Ed2d 799 (1963). Though not unimportant as far as judicial administration is concerned, the fact that the conflict was communicated to the court four days prior to trial rather than seven days seems pale in relative importance to the need and right to have an attorney who will truly represent and defend one in such serious matters.

2. The Prosecution's Case Was So Totally Devoid Of Evidentiary Support on a Material Element of the Charge as to Render the Conviction Unconstitutional Under the Due Process Clause of the Fourteenth Amendment.

The elements of the crime of Custodial Interference in the First Degree are as follows:

(1) Taking, enticing, or keeping a person from her lawful custodian;

(2) With knowledge or reason to know that he has no right to do so;

(3) With intent to hold her permanently or for a protacted period;

(4) In causing that person to be removed from the state. ORS 163.257.

In the present case, the prosecution utterly failed to carry its burden on the issue of the intent of petitioner. The record reveals, without contradiction, that petitioner actually gave Miss Kolding $200.00 on the very first day that she was with him in Canada, for the express purpose of allowing her to return home that same day, or at any other time that she so desired (Tr. 62-63). Therefore, any intent to stay with petitioner in Canada was that of her own. She had the means to return any time that she so desired, but obviously did not desire to return. Such evidence precludes a rational finding by a reasonable jury that, beyond a reasonable doubt, petitioner intended to hold Miss Kolding "permanently or for a protracted period of time." That element is central to a conviction for this crime. In the absence of the element, as with any other material element,

the prosecution must fail and petitioner is entitled to be acquitted.

Similarly, the transcript is lacking in evidence beyond a reasonable doubt that petitioner either took or enticed Miss Kolding to come to Canada to be with him, rather than simply allowing Miss Kolding to exercise her own strong will, which will was exemplified by her twice-a-day telephone campaign which she launched after petitioner pleaded guilty to the misdemeanor offense (Tr. 63-64). That is not to say that petitioner went out of his way to prevent her from coming to Canada, either; for the evidence was such that one could reasonably infer that petitioner made transportation available to her, should she decide to join him in Canada. However, the statute does not require, under pain of felony conviction, that an individual insure that the subject does not follow him wherever he may go. The tenacity of Miss Kolding's own will was amply demonstrated by the inability of her parents to prevent her from constantly contacting petitioner, let alone packing up and actually leaving home at one o'clock in the morning. This was not a situation in which petitioner exercised any sort of physical custody over Miss Kolding, though the statute in

question perhaps better addresses that situation than the facts of the present case. Miss Kolding exercised her own independent judgment in deciding to keep track of petitioner in spite of her parent's position and the court's order; to decide to join him in Canada; to arise at the appointed hour for purposes of leaving her home; to leave her home at one o'clock in the morning; and then get into the automobile of a third party for the trip to Canada. She was neither neutral nor hesitant about joining petitioner; she affirmatively sought that result.

In Jackson v. Virginia, 443 US 302, 99 S. Ct. 2781, 61 L Ed2d 560 (1979), the Supreme Court held that a Federal Habeas Corpus Court must consider whether any rational trier of fact could find guilt beyond a reasonable doubt. In essence, the "any evidence" test was replaced. As such, Jackson, reaffirmed the principle set forth in the case In re Winship, 397 US 358, 90 S. Ct. 1068, 25 L Ed2d 368 (1970), which emphasized that the prosecution must prove beyond a reasonable doubt every fact necessary to convict a defendant upon the crime alleged. Further, in Jackson, this Court reiterated that "reasonable doubt" is a "subjective state of near

certitude."

In comparing the facts produced against petitioner in the present prosecution with the tests of Jackson and Winship, supra, it is clear that the prosecution has failed to carry its burden with respect to intent, upon which there was absolutely no evidence whatsoever, and there remains a substantial and reasonable doubt respecting the elements of enticing and "causing" Miss Kolding to be removed from the State of Oregon.

3. Petitioner Was Unfairly and Unduly Prejudiced, and Thus Denied His Right to a Fair Trial and Fundamental Due Process, by the Trial Judge's Statement to the Jury that Petitioner Had Been "Advised" By A Prior Judge Not To Contact or Communicate With Miss Kolding.

During the course of the trial the trial court informed the jury that:

> "On July 5, 1979, Circuit Court Judge Jack F. Olsen advised the defendant that he was not to contact or communicate with Laurie M. Kolding by mail, by phone, in person, or by any manner whatsoever, nor should he cause others to contact her or communicate with her." (Tr. 73).

The clear implication of such a statement to the jury

was that there had been a prior court action against petitioner, resulting in a court order against him, which made it a violation "of some sort" for petitioner to have any contact with Miss Kolding, or to be involved in any way with the process of somebody else contacting her. Therefore, the jury could have reasonably concluded from the evidence that since petitioner had communicated with Miss Kolding, for they had conversed by telephone on numerous occassions, even though at her instigation, petitioner had violated the judge's restrictions, thus deserving of some punishment.

Clearly, however, communication with Miss Kolding, even if instigated by petitioner, would not be a violation of ORS 163.257, even though it would be a violation of the prior court order. Therefore, it is quite possible that the jury found petitioner in violation of that prior court order and that fact prejudicially contributed to their finding him guilty of the offense of Custodial Interference.

The proffered evidence should have been excluded upon the basis that it was either irrelevant or any relevancy which it may have was outweighed by the prejudice which would reasonably be generated by advising the

jury of this fact. Its admission was clearly to his prejudice, thus depriving petitioner of a fair trial as guaranteed to him by the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Respectfully submitted,

Cecil H. Quesseth
Attorney for Petitioner

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PRIMITIVO FLORES RUIZ, No. 82-3279

Appellant, D.C. No. 81-6397 E

vs. MEMORANDUM

HOYT C. CUPP, SUPERINTENDENT,
OREGON STATE PENITENTIARY,

Appellee.

Appeal from the United States District Court
for the District of Oregon
Honorable Robert C. Belloni, Presiding

Submitted: December 22, 1982*

Before: BARNES, WRIGHT and POOLE, Circuit Judges.

Appellant Ruiz appeals the district court's dismissal of his petition for a writ of habeas corpus following his conviction for custodial interference with a minor female. We find that none of the grounds stated in the appeal mandate reversal and accordingly affirm.

The state court's refusal to allow substitution of counsel the day before trial did not violate his right to effective counsel. The court considered all the factors as in Hudson v. Rushen, 686 F.2d 826 (9th Cir. 1982), cert. denied, 103 S.Ct. 1896 (1983). The request for

*This panel finds this case appropriate for submission without oral argument pursuant to 28 U.S.C.A. 123(a) and Fed. R. App. P. 34(b).

new counsel was untimely in this case, and the defense presented by counsel of record on Ruiz's behalf at trial appears to have been adequate. Both factors are to be considered in evaluating a trial court's denial of a motion for new counsel. United States v. Mills, 597 F.2d 693, 700 (9th Cir. 1979). The Supreme Court recently stressed:

> broad discretion must be granted trial courts on matters of continuances; only an unreasoning and arbitrary "insistence upon expeditiousness in the face of a justifiable request for delay" violates the right to the assistance of counsel.

Morris v. Slappy, 51 U.S.L.W. 4399, 4402 (April 20, 1983), quoting Unger v. Sarafite, 376 U.S. 575, 589 (1964).

The state court's denial fo a continuance here cannot be said to be "an unreasoning and arbitrary insistence upon expeditiousness."

Ruiz's objections of the insufficiency of the evidence and that certain documentary evidence was improperly admitted are without merit. See Jackson v. Virginia, 443 U.S. 307, 318-19 (1979); Cassasa v. Nelson, 452 F.2d 1083, 1085 (9th Cir. 1971).

"In the end, the totality of the circumstances does not leave us with the impression that an injustice has been suffered." United States v. Green, 680 F.2d 183,

191 (D.C. Cir. 1982), cert. denied, 103 S.Ct. 1204 (1983).

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF OREGON

PRIMITIVO FLORES RUIZ

Petitioner,

v. CIVIL NO. 81-6397-E

OPINION

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,

Respondent.

BELLONI, Judge:

Primitivo Flores Ruiz, petitioner, seeks a writ of habeas corpus pursuant to 28 U.S.C. § 2254 (1976). The petition is denied.

Petitioner, age 44 years, began dating 14 year old Lori Kolding of Pendleton, Oregon. Miss Kolding's parents strongly objected to this relationship, but the two continued seeing each other. The parents sought help from the courts. Their efforts resulted in Ruiz being charged with sexual abuse in the second degree, ORS § 163.415, a charge to which Ruiz pleaded guilty. The sentencing judge placed Ruiz on probation and ordered him not to contact or communicate with Miss Kolding ever again.

Ruiz then moved to Canada. He did, however, manage to let Miss Kolding know where he was and how she could contact him. As a result, she began

calling him on a daily basis, as often as twice a day. In the course of their conversations they planned to have Miss Kolding run away from home and follow Ruiz to Canada.

Ruiz then made arrangements to have two friends, Gail and Tammy Watkins, pick up Miss Kolding at her home and drive her to Canada. Shortly thereafter Miss Kolding did, in fact, leave home, met with the Watkinses, and drove with them to Canada, where they met Ruiz.

The next three weeks Miss Kolding and Ruiz spent together in Canada. They entered into a sort of marital contract, evidenced by a written agreement. They intended to stay in Canada at least one year. Ruiz did offer to pay Miss Kolding's way back to Oregon, should she ever desire to leave, but she declined, choosing to remain with Ruiz.

At the end of the three weeks, Canadian police located the two and arrested Ruiz. Ruiz was then taken back to Oregon, where he was tried on charges of custodial interference in the first and second degrees. ORS § 163.245 & 163.25

The day before trial, Ruiz's attorney asked to withdraw from the case. Ruiz explained to the trial judge

that he and his lawyer simply did not get along. The trial judge refused to allow the withdrawal, and the trial proceeded.

In the course of the trial the above facts were brought out, including the order arising out of Ruiz's prior conviction. Evidence of the conviction itself, however, was not admitted. Ruiz objected that evidence of even the order itself was irrelevant, but the trial court overruled.

The jury convicted Ruiz on the charge of custodial (sic.) interference in the first degree. Ruiz appealed his conviction through the state courts, but the Oregon courts affirmed.

Now Ruiz brings this petition for a writ of habeas corpus, alleging four grounds. First, he contends he was denied effective assistance of counsel since the trial judge refused to let his lawyer withdraw. Second, he argues there is insufficient evidence to support his conviction. Third, he believes his right to due process was violated when the judge admitted into evidence the prior order precluding contact with Miss Kolding. Fourth, he submits the Oregon court did not have jurisdiction since at all relevant times he was in Canada.

OPINION

A. Effective Assistance of Counsel

Petitioner contends he was denied effective assistance of counsel when the trial judge refused to let his lawyer withdraw on the eve of trial. The argument is that the lawyer and the client disliked each other so much that Ruiz could not have been fairly represented. Holloway v. Arkansas, 435 U.S. 475 (1978) is cited for the proposition that the trial judge should have taken more seriously the conflict between the attorney and his client.

The district attorney defends the trial judge's decision, noting that Umatilla County Rule 16 specifically provides that resignation of an attorney within two weeks of trial is not permitted unless the trial court, in its discretion, determines no delay will result.

Petitioner's objection is unmerited. The trial judge was plainly within his authority under the local rule. There is no allegation that Ruiz's lawyer did anything but ably represent his client at the trial itself. And the case cited is simply not on point. Petitioner cites Holloway for the proposition that the representation of Ruiz's attorney -- that he could not properly defend

his client -- should somehow be taken as a "judicial admission of fact," binding the trial court. It is true that Holloway counselled trial courts to take seriously the representations of attorneys, since "when they address the judge solemnly upn a matter before the court, their declarations are virtually made under oath." Id. at 486. However, the Court nowhere intimated that representations made by attorneys are binding on the courts. Moreover, the Court cited other factors, present in Holloway and not present here, that required deference in that case to the attorney's motion to withdraw. In Holloway the defense attorney represented three clients in the same case. The trial court, however, refused to allow the attorney to withdraw and refused to appoint additional counsel. On review, the Supreme Court said that because a potential conflict of interest existed, because the attorney was in the best position to know of the existence of such a conflict of interest, and because the attorney was under an ethical obligation to report the conflict of interest, the trial court should have taken more seriously the defense attorney's protestation. Unlike Holloway, this case presents no conflict of interest, only a conflict of personalities.

B. Sufficiency of Evidence

Petitioner's second objection is that there is insufficient evidence to support the jury verdict against him. On a petition for writ of habeas corpus, the reviewing court must determine whether any rational trier of fact could have found guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 302, 318-19 (1979). Ruiz argues that this constitutional standard cannot be met by the evidence in the record.

The crime involved here has four elements 1) taking or enticing a person from her lawful custodian; 2) knowledge that it is unlawful to do so; 3) intent to hold her for a protracted period; and 4) causation. ORS §§ 163.245 & 163.257. Ruiz argues that the evidence is insufficient to satisfy three of these elements: the first, the third, and the fourth.

The district attorney argues that there is sufficient evidence to satisfy the constitutional requirement with respect to each of the three contested elements. The record indicates the district attorney is correct.

There is evidence that although Ruiz never called Miss Kolding, he made sure that she knew how to call him. In fact, he instructed her to call him. (Tr. 67).

There is evidence that the two planned their escape to Canada as much as two weeks in advance. (Tr. 61). Testimony further reveals that Ruiz himself arranged to have Gail and Tammy Watkins pick Miss Kolding up, and that Ruiz told her he was doing so. (Tr. 49, 54). Miss Kolding admits that she and Ruiz planned to stay in Canada at least a year. (Tr. 57), and that she and Ruiz even entered into a marital agreement (Tr. 57-58). All of this evidence is sufficient to allow a reasonable trier of fact to find Ruiz guilty.

Petitioner argues that at best the evidence sin ply shows that Ruiz made it possible for Miss Kolding to escape of her own free will. Even if that were the case, the evidence would still be sufficient. The fact that Miss Koldbing (sic.) wanted to go to Canada, and that Ruiz did not physically abduct her is not relevant. Petitioner appears to confuse the requirement of entice-ment, which is an element of the relevant crime, and forceable compulsion, which is not.

C. Evidence of Prior Order

When the trial judge advised the jury of the prior court order prohibiting Ruiz from seeing Miss Kolding

Ruiz objected that the evidence was irrelevant. The trial judge overruled, commenting that the evidence was relevant to the element of Ruiz's knowledge that his actions were unlawful.

Petitioner originally contended that the admission of this order violated his privilege against self incrimination. Now he makes no argument to that effect. Instead, he argues that the admission of the order was so prejudicial as to deprive him of his due process right to a fair trial.

The district attorney argues that the evidence was relevant, and even if not, its admission raises no constitutional issue. Again, petitioner's argument has no merit.

First, the evidence is relevant to the issue of whether Ruiz knew that he had no right to communicate or contact Miss Kolding.

Second, the court went to great pains to sanitize the evidence against possible prejudice. The prior order was a part of Ruiz's sentence upon conviction of sexually abusing Miss Kolding. The judge deleted any reference to the charge, the guilty plea, or the sentencing. He simply informed the jury that Ruiz had previously been advised by the court to stay away

from Miss Kolding.

Third, even if the evidence was not relevant, its admission raises no constitutional issue. There is no "federally significant external event" like the voluntariness of a confession or the admission of perjured testimony. See Crisafi v. Oliver, 396 F.2d 293, 294-95 (9th Cir. 1968). Neither was the admission of the evidence so prejudicial as to violate petitioner's fundamental right to a fair trial. Cassasa v. Nelson, 452 F.2d 1083, 1085 (9th Cir. 1971).

D. Jurisdiction

Petitioner argues that the Oregon court did not have jurisdiction because he was at all relevant times in Canada. The district attorney argues that the result of Ruiz's actions still occurred in Oregon, and that was sufficient. The district attorney is correct.

ORS § 131.215(1) specifically provides for Oregon jurisdiction where the result of a person's actions occurs in the state. The result of Ruiz's telephone calls and travel arrangements clearly took place in Oregon, so the court of this state properly exercised its jurisdiction.

Petitioner argues that even under the statute the

state lacks jurisdiction since any conduct occurring in the state that otherwise might be an element of a crime must be caused by the out of state actions. ORS § 131.215(2). As already indicated, this argument is unconvincing. Ruiz did cause Lori Kolding to be enticed, to leave home, and to stay away from home.

CONCLUSION

Petitioner has proven neither that he was denied effective assistance of counsel, nor that there was insufficient evidence to support the jury's verdict, nor that the evidence admitted violated either his privilege against self incrimination or his right to a fair trial, nor that the Oregon court lacked jurisdiction over his case. As a result his petition for a writ of habeas corpus is denied.

Dated this 6th day of April, 1982.

/s/ BRUCE BELLONI
United States District Judge

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PRIMITIVO FLORES RUIZ,

Plaintiff-Appellant, No. 82-3279

vs. DC CV 81-6397 RCB

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,

Defendant-Appellee.

APPEAL from the United States District Court for the PORTLAND District of OREGON.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the PORTLAND District of OREGON and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered on JUNE 23, 1983

No. 83-392

In the Supreme Court of the United States

OCTOBER TERM, 1983

PRIMITIVO FLORES RUIZ,

Petitioner,

v.

HOYT C. CUPP, Superintendent,
Oregon State Penitentiary,

Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
JAMES E. MOUNTAIN, JR.
Solicitor General
*THOMAS H. DENNEY
Assistant Attorney General
100 Justice Building
Salem, Oregon 97310
Telephone: (503) 378-4402
Counsel for Respondent

*Counsel of Record

QUESTIONS PRESENTED

1. On the day before petitioner's state-court trial was to begin, the trial judge denied, as untimely, the request of petitioner and his retained counsel to allow counsel to withdraw, because of unspecified differences between petitioner and himself, and to postpone petitioner's trial until petitioner obtained other counsel. Did the trial judge thereby violate petitioner's Sixth-Amendment right to have the assistance of counsel for his defense?

2. In petitioner's state-court trial for custodial interference, the prosecution showed that, over the objection of the parents of a 14-year-old girl, petitioner, a 44-year-old man, had encouraged the girl to keep in touch with him, arranged for her transportation to Canada, and there entered into a purported marital agreement with her. Does petitioner's conviction violate due process of law, on the theory that this evidence is insufficient to support a finding, beyond reasonable doubt, that petitioner took or enticed the girl in question from the custody of her parents, with intent to hold her permanently or for a protracted period?

3. During petitioner's state-court trial for custodial interference, the trial judge informed the jury that another judge had "advised" petitioner not to communicate with the child petitioner was accused

of subsequently enticing away from her parents. Was this evidence of petitioner's culpable mental state such an improper showing of irrelevant and prejudicial "other misconduct" that its admission denied petitioner due process of law?

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OPINIONS BELOW

The opinion of the United States District Court for the District of Oregon denying Ruiz's petition for a writ of habeas corpus (Petition, at App-4) is not reported. The memorandum of the United States Court of Appeals for the Ninth Circuit affirming the judgment of the district court (Petition, at App-1) was not designated for publication, and is also not reported.

JURISDICTION

Respondent accepts petitioner's statement of the grounds on which the jurisdiction of this Court is invoked.

CONSTITUTIONAL AND STATUTORY PROVISIONS

Respondent accepts petitioner's statement of the constitutional provisions and statutes which this case involves.

STATEMENT OF THE CASE

Respondent believes petitioner's statement of the case one-sided and incomplete. Respondent accepts that statement only with the following additions and clarifications.

1. In 1980, Ruiz was convicted in an Oregon state trial court of custodial interference in the first degree, in violation of Oregon Revised Statutes 163.257. The charge was predicated on the theory

that Ruiz, a 44-year-old man, had enticed a 14-year-old girl to run away from her parents' home and join him in Canada, where they cohabited for three weeks, before Ruiz was arrested and returned to Oregon. The Oregon Court of Appeals summarily affirmed Ruiz's conviction without written opinion, 50 Or. App. 615, 625 P.2d 1390 (1981); and the Oregon Supreme Court denied his petition for discretionary review of the Court of Appeals' decision, 291 Or. 117, 631 P.2d 341 (1981).

Ruiz then petitioned for a writ of habeas corpus, pursuant to 28 U.S.C. § 2254. The district court denied his petition, and the court of appeals affirmed the judgment of the district court. Ruiz's petition for certiorari followed.

2. On the day before Ruiz's state-court trial was to begin, his retained counsel asked for leave to withdraw from the case, and presented a combination of motions which were apparently intended to postpone Ruiz's trial, regardless of whether or not counsel's request for permission to withdraw was granted. Ruiz's summary of what transpired on this occasion (Petition, at 6-8) is incomplete. Before counsel asked to withdraw from Ruiz's case, he moved as follows:

> "[DEFENSE COUNSEL]: Yes. May it please the court, Your Honor, as the court is aware, I talked with you on Friday regarding this appearance in court today of Mr. Ruiz. There has been a

matter come up, my representation of Mr. Ruiz, that has affected the attorney-client relationship.

"Before I do that, however, I would like to orally move at this time — the trial in this matter is set for tomorrow, Tuesday, and I would orally move at this time for a continuance until a later time on the basis that Mr. Ruiz has several matters which he feels are, through another person by the name of Thoren, has filed a matter in Federal Court which he feels should be disposed of prior to the State court action, and that has not been taken care of, and so on those bases he wishes to have a continuance in the matter so that he can more fully prepare the case, and so on that basis I would move the court to continue the case from Tuesday, the 22nd of January, until a later date.

"THE COURT: Is there anything further that you wanted to relate to the court concerning this matter?

"[DEFENSE COUNSEL]: Also, Your Honor, I'd at this time want to withdraw as his attorney, [*etc.*]" (Trial Tr. 26-27. *Cf.* Petition, at 6).

3. During Ruiz's trial, the prosecution proposed to offer into evidence a copy of the judgment in an earlier case, in which Ruiz had been convicted of sexual abuse of the girl involved in the case on trial and had been ordered, as a condition of probation, to have no further contact with the girl (Trial Tr. 69-71). When defense counsel objected to this proffered evidence as irrelevant and unduly prejudicial, the trial court held it admissible for its bearing on the mental element of the crime charged, but undertook to "sanitize" the evidence in question, by simply telling the jury that:

> "* * * [Y]ou are advised that on July 5, 1979, Circuit Judge Jack F. Olsen advised the defendant that he was not to contact or communicate with Lori M. Kolding by mail, by phone, in person, or by any manner whatsoever, nor should he cause others to contact her or communicate with her." (Trial Tr. 73; Petition, at 17).

4. While the jury found Ruiz guilty of two charges of custodial interference, predicated on alternative theories of guilt (*i.e.*, "taking" the girl and "enticing" her (*see* Trial Tr. 87, 98-99)), the trial court ordered the two charges merged for sentencing purposes (Trial Tr. 116). Hence, contrary to Ruiz's assertion at page 8 of his petition, he was "convicted" of only one charge.

REASON FOR DENYING THE WRIT

The federal questions presented are not substantial enough to warrant review by this Court.

The merits of the contentions Ruiz raises in his petition for certiorari have already been considered by one state appellate court, on Ruiz's direct appeal from his conviction, and by two lower federal courts, in the present habeas corpus proceedings. None of these courts has found any substance to those contentions. Indeed, we think that to state Ruiz's two due-process claims in terms of the facts of this case, as our rephrasing of his second and third "Questions Presented" attempts to do, is sufficient to

demonstrate their lack of merit. Like the court of appeals (*see* Petition, at App-2), we see no need to elaborate upon the reasons given by the district court for rejecting those claims. *See* Petition, at App-9 to App-12.

The right-to-counsel claim advanced in Ruiz's first "Question Presented" appears to be nothing less than an assertion that the Sixth Amendment requires the trial court to postpone a criminal trial whenever the defendant expresses dissatisfaction with his present counsel or counsel indicates that he and his client are in disagreement over some unspecified matter. Ruiz thus seems to be arguing that he is constitutionally entitled to the very kind of "meaningful relationship" between attorney and client which this Court has held *not* to be constitutionally required in *Morris v. Slappy*, ___ U.S. ___ 75 L.Ed.2d 610 (1983). And his reliance upon *Holloway v. Arkansas*, 435 U.S. 475 (1978), in support of such an argument, is misplaced. Unlike *Holloway*, the present case does not involve the potentially conflicting interests of multiple defendants who were represented by the same attorney. As the district court succinctly put it, "this case presents no conflict of interest, only a conflict of personalities" (*see* Petition, at App-8).

The courts below properly held that, on the record of this case, the Oregon trial court was not

required by the Sixth Amendment to grant the request of Ruiz and his retained counsel, made on the day before trial was scheduled to begin, for postponement for an indeterminate time, so that, *inter alia*, counsel could withdraw, Ruiz could retain new counsel, and new counsel could familiarize himself with the case. That holding does not warrant reexamination by this Court.

CONCLUSION

For the above reasons, the petition for certiorari should be denied.

Respectfully submitted,

DAVE FROHNMAYER
Attorney General of Oregon
WILLIAM F. GARY
Deputy Attorney General
JAMES E. MOUNTAIN, JR.
Solicitor General
THOMAS H. DENNEY
Assistant Attorney General
Counsel for Respondent